Mailed 5/10/2000

IN THE MATTER OF:	*	
	*	
Harold A. Northup	*	
Claimant	*	
	*	
Against	*	Case No.: 1999-LHC-2040
	*	
	*	OWCP No.: 1-144588
Electric Boat Corporation	*	
Employer/Self-Insurer	*	
	*	
And	*	
	*	
Director, Office of Workers' Compensation Programs U.S. Department of Labor	*	

APPEARANCES:

David N. Neusner, Esq.
For the Claimant

Peter A. Schavone, Esq.
For the Employer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Directoir

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on December 7, 1999 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 8	Attorney Neusner's letter Filing his Fee Petition	12/20/99
CX 9	Fee Petition	12/20/99
RX 19	Employer's comments thereon	01/5/00

The record was closed on January 5, 2000 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On August 1, 1998, Claimant suffered an injury in the course and scope of his maritime employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on April 14, 1999.

7. The applicable average weekly wage is $896.46.

8. The Employer voluntarily and without an award has paid temporary total compensation from August 4, 1998 through December 29, 1998, as well as permanent partial benefits from December 30, 1998 through at least January 20, 2000. (RX 4 - RX 7)

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. The date of his maximum medical improvement.

3. The applicability of Section 8(f) of the Act.

Summary of the Evidence

Harold A. Northrup ("Claimant" herein), fifty-seven (57) years of age, with a tenth grade education and an employment history of manual labor, including four years as a commercial fisherman, began working in September of 1962 as a chipper at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. He left the shipyard after three years and went to work in Rhode Island, first as a painter and then as a machine operator for a company making spools. He returned to work at the shipyard on October 28, 1968 as a painter and his duties included, **inter alia**, preparing and cleaning areas on the boats first by sandblasting and removing rust or other debris, then spray painting or brush painting the sections of the boat. He worked all over the boats as directed and he had to climb up/down several levels of ladders – or 200 - 300 steps, depending upon the stage of construction of the boat –- to reach the various work sites, Claimant remarking that he had to carry his tool bag and supplies to those sites, that the air hoses weighed 80 to 90 pounds and that the buckets of paint weighed 100 to 160 pounds. Claimant, in the performance of his duties, used various air-powered or pneumatic tools on a daily basis; his work involved prolonged standing, much climbing on/off the boats, often crawling around and into tight and confined spaces and sometimes working in awkward positions, such as on his knees, back, side, etc. He remained as a painter throughout his thirty-three (33) years at the shipyard and his personnel records reflect that he took an "early retirement" on October 30, 1998. (TR 13-20; RX 3, RX 18 at 3-8)

On August 1, 1998 Claimant, after finishing his lunch, was returning to his work site along the appropriate walk way halfway through the third shift (11:00 P.M. to 7:00 A.M.) and as he went over the tracks for the gantry cranes, he slipped on the curb, fell down and injured his right knee. He reported the injury to on-duty personnel at the Employer's Yard Hospital and Nurse Rendeiro made a written report as "the computers were down." (RX 1) She described the injury as a knee sprain/strain and authorized treatment by Dr. William R. Cambridge, an orthopedic surgeon in nearby Norwich. (**Id.**; RX 18 at 8-9; TR 20-25)

Dr. Cambridge, who first saw Claimant on November 28, 1995 for other injuries, (CX 1-14), examined Claimant on August 5, 1998 and the doctor's impression was "post traumatic synvotis versus internal derangement, and he injected the right knee with Cortisone and took Claimant out of work for one week until the followup visit in one week. (CX 1-8) On August 14, 1998 Claimant advised the doctor that the injection provided "about two or three days of relief" and the doctor, finding "swelling, popping (and) some mild instability," gave him another Cortisone injection and kept him out of work, the doctor concluding, "If this shot fails he should be a candidate for arthroscopic clean out." (CX 1-7; RX 18 at 9-11)

On August 21, 1998 Claimant advised the doctor that he "recently had another episode of instability in which his knee gave out and he sustained a twisting injury to the right ankle" and the doctor, suspecting an ankle strain, reported that the "patients right knee has been unstable and swelling, recommended arthroscopic evaluation of the right knee. (CX 1-6) That surgery took place and, as of October 23, 1998, Claimant was "doing very well" but had "difficulty doing stairs" and "still (had) some swelling." The doctor again gave him a Cortisone injection and scheduled a followup exam "in a couple of weeks." (CX 1-5) That took place on November 11, 1998, at which time, according to the doctor, "He has degenerative arthritis of his right knee. He has some grinding and a mild effusion. He had significant relief from a Cortisone injection given approximately three weeks ago and wishes another injection to see if we can improve him some more. An injection was given today." (CX 1-4)

As of December 29, 1998, Dr. Cambridge reported that Claimant was on his way for an examination by the Employer's medical expert, Dr. Philo F. Willetts, Jr., an orthopedic surgeon, that Claimant's "knee is coming along fairly well," that he "has a slight effusion, some patellofemoral crepitus, some medial joint line tenderness consistent with mild arthritis," and the doctor scheduled a followup visit in six weeks time. (CX 1-3) He returned to see the doctor on January 27, 1999, at which time Claimant requested "a Cortisone injection into his knee" and the doctor concluded, other than Synvisc injections, we really have nothing to offer him. He is not yet a candidate for total knee replacement" and he was "released with appropriate restrictions." A followup visit was scheduled "in six months" time. (CX 1-2)

As of July 7, 1999 Claimant returned to see the doctor and the doctor, reporting findings of "a modest effusion of the right knee" as well as "(c)repitus over the medial joint line, opined that Claimant "has degenerative arthritis of the right knee secondary to work related injuries." Dr. Cambridge did "not give (Claimant) a Cortisone injection" at that time because "it was pretty much agreed in the medical community that the Synvisc injections are just only temporary and they are probably not justified at this point." (CX 1-1)

As noted, Dr. Willetts examined Claimant on December 30, 1998 and the doctor, after the usual social and employment history, his review of Claimant's medical records and diagnostic tests and the physical examination, gave the following (CX 2-5):

DIAGNOSIS:

1. Status post previous total medial and lateral meniscectomies and ligamental injury right knee with degenerative arthritis - preexisting.

2. Status post partial resection posterior horn medial meniscus, status post sprain right knee, August 1, 1998, by history. Dr. Willetts opined that Claimant is partially disabled because of his August 1, 1998 shipyard accident, that that accident is not the sole cause of such disability, that his significant injuries to his right knee in 1971 and 1978, treated by major open surgery to his knee, have "resulted in subsequent post traumatic arthritis of his knee," and that he "may perform selected work" but should "avoid squatting, kneeling and ladder climbing," " could occasionally climb and descend stairs with railings," "should avoid standing or walking more than fifteen minutes at a time and alternate sitting at will" but "could otherwise use his hands without restriction with respect to any injury of August 1, 1998, and could use his feet for foot pedal controls." According to the doctor, Claimant had a twenty-seven (27%) percent permanent partial physical impairment of the right lower extremity, as of December 30, 1998, the doctor opining that twenty-four (24%) percent thereof pre-existed his August 1, 1998 injury because of his 1971 and 1978 right knee injuries, "the substantial loss of menisci thereafter," the "chronic post traumatic arthritis of the right knee that was existing prior to August 1, 1998" and "some degree of medial collateral ligamental laxity that preexisted August 1, 1998." (CX 2-6) Dr. Willetts further opined that Claimant reached maximum medial improvement on December 28, 1998. (**Id.**)

Claimant leads a mostly sedentary life as any physical exertion aggravates his multiple medical problems. He has difficulty walking up the three flights of stairs at his home and prolonged standing causes his right knee to swell. He also has problems sitting because he cannot bend that knee and must keep his right leg extended out as he sits. He was forced to take an "early retirement" (RX 3) on October 28, 1998, at age 55, because he no longer could perform his assigned duties, although he would have preferred to continue working. He currently receives Social Security Administration disability benefits as that agency has declared him to be totally disabled for all gainful employment. (TR 26-35; RX 18 at 11-12) He has looked for work but no one will hire him (RX 18 at 13-19), and he has also experienced pulmonary problems since May of 1999. (RX 18 at 20-21)

On the basis of the totality of this record and having observed the demeanor and having heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978). At the outset it further must be recognized that all factual doubts must be resolved in favor of the claimant. **Wheatley v. Adler**, 407 F.2d 307 (D.C. Cir. 1968); **Strachan Shipping Co. v. Shea**, 406 F.2d 521 (5th Cir. 1969), cert. denied, 395 U.S. 921 (1970). Furthermore, it consistently has been held that the Act must be construed liberally in favor of the claimant. **Voris v. Eikel,** 346 U.S. 328 (1953); **J.V. Vozzolo, Inc. v. Britton**, 377 F.2d 144 (D.C. Cir. 1967). Based upon the humanitarian nature of the Act, claimants are to be accorded the benefit of all doubts. **Durrah v. WMATA,** 760 F.2d 320 (D.C. Cir. 1985); **Champion v. S & M Traylor Brothers,** 690 F.2d 285 (D.C. Cir. 1982). **Harrison v. Potomac Electric Power Company,** 8 BRBS 313 (1978).

The Act provides a presumption that a claim comes within the provisions of the Act. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Anderson v. Todd Shipyards, supra.**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that a **"prima facie"** claim for compensation, to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **United States Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S. Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir.

1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita, supra; Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier, supra; Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant’s favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his right knee degenerative arthritis, resulted from working conditions and his August 1, 1998 accident at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment

is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant injured his right knee in a relatively minor shipyard accident on August 1, 1998, that the Employer authorized appropriate medical care and treatment and has paid certain compensation benefits to Claimant, as stipulated by the parties (TR 6-7) and as corroborated by this closed record (RX 4-RX 7), and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a painter. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). Paul F. Murgo, Claimant’s vocational rehabilitation counselor, has opined that Claimant is totally unemployable because of his age, limited education and limited transferrable skills, his residual work capacity based on his physical limitations and his multiple medical problems. (CX 7) I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988);

Eckley v. Fibrex and Shipping Company, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or

if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on December 27, 1998 and that he has been permanently and totally disabled from December 28, 1998, according to the well-reasoned opinion of Dr. Willetts. (RX 12)

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer, although initially controverting Claimant's entitlement to benefits (RX 2), nevertheless has accepted the claim, provided the necessary medical care and treatment and voluntarily paid certain compensation benefits from August 4, 1998 to the present time and continuing. **Ramos v. Universal Dredging Corporation**, 15

BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates

an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant worked for the Employer from 1962 to October 28, 1998, except for the several years he worked elsewhere (RX 3), (2) that Claimant’s first right knee injury occurred in 1971, was treated by open surgery and he wore a polio-type brace for 3 to 4 years (RX 18-24), (3) that Claimant re-injured his right knee in a shipyard accident while working in the Paint Shop of the graving dock (RX 11), (4) that the Employer authorized treatment by Dr. Raymond Trott (**Id.**), (5) that he reinjured his right knee on November 20, 1977 while climbing up a ladder in the engine room of the 650 Boat and a right knee contusion was diagnosed at the Yard Hospital by Dr. A.D. MacDougall, the Employer’s Medical Director (RX 9), (6) that Claimant was unable to work from November 22, 1977 through December 10, 1978 and on February 13, 1980 because of that injury (RX 10), (7) that the Employer authorized appropriate medical care by Dr. John B. Thayer Jr., an orthopedic surgeon (RX 10), (8) that

Claimant underwent a lateral release because of the chondromalacia of the patella, “a new procedure” at that time, in July of 1978 (RX 17-1), (9) that Claimant was experiencing “a great deal of pain in his knee and (had) difficulty with stairs” as of July 21, 1980 (RX 17-3), (10) that Dr. Thayer felt that “the sufficiency of his leg is reduced by about 20%” (Id.), (11) that Dr. Thayer continued to see Claimant as needed for his right knee problems (RX 17-4), (12) that Dr. John W. Hayes, as of November 26, 1980, agreed that Claimant should continue on light duty and might need more surgery (RX 16), (13) that the Claimant reinjured his right knee on April 8, 1985 when he stepped on a pallet in the graving dock (RX 8), (14) that the Employer authorized treatment by Dr. Thayer (**Id.**) and paid Claimant appropriate benefits while he was unable to work, (15) that Claimant injured his left shoulder and cervical area in a shipyard accident on January 24, 1989 when he “reached down to grab a bucket.” (CX 4), that the Employer again authorized treatment by Dr. Thayer on six occasions for “cervical radiculitis,” (16) that the doctor opined, as of June 26, 1992, that Claimant “has a permanent partial disability due to a cervical disc at C6-7" of five (5%) percent impairment of the whole person based on the AMA **Guides** (CX 4), (17) that the doctor imposed permanent restrictions against heavy lifting, prolonged sitting “especially if the neck is held in a flexed position such as reading” (**Id.**), (18) that Claimant began to experience in 1988 numbness, tingling and loss of dexterity in both hands, (19) that he continued to work with those symptoms until February 21, 1991, at which time he was examined at the Lawrence and Memorial Occupational Health Clinic (OHC), (20) that Dr. Rafael E. de la Hoz as of May 23, 1990, reported that diagnostic tests revealed bilateral carpal tunnel syndrome, worse on the right, due to his use of vibratory tools at the shipyard, that the doctor prohibited the use of vibratory tools immediately and recommended the use of splints at nighttime, anti-inflammatories “and an occupational therapy referral to try to control all your symptoms” (CX 5), (21) that Charlene Kaiser, MD, MPH, CIH, of the OHC staff, rated Claimant’s impairment, as of March 3, 1992, at twenty-five (25%) percent permanent partial impairment of the right upper extremity and twenty-four (24%) percent of the left upper extremity (CX 5), (22) that Claimant had been experiencing “a hearing loss for years,” had left ear surgery in 1970 by Dr. Rosignoli at Kent County Hospital, (23) that Dr. Warren F. Woodworth, a Board-Certified Otolaryngologist, examined Claimant on December 12, 1995, at which time he was wearing bilateral hearing aids, rated Claimant’s bilateral hearing loss, based on the bone conduction formula, at 8.1% (CX 3), (24) that Dr. William A. Wainright, a specialist in hand surgery, agreed on the diagnosis of bilateral carpal tunnel syndrome, a work-related injury, and on the permanent restrictions imposed by Dr. Kaiser two months earlier (RX 14), (25) that Dr. Stephen J. Kamionek, also a specialist in hand surgery, agreed, as of January 17, 1994 on the diagnosis and etiology of the bilateral carpal syndrome and the need for those permanent work restrictions (RX 15), (26) that he has sustained previous work-

related industrial accidents prior to August 1, 1995, (27) while working at the Employer's shipyard and (28) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability (**i.e.**, the above-enumerated multiple medical problems) and his August 1, 1995 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Willetts (RX 12) and Mr. Murgo. (CX 7) **See Atlantic & Gulf Stevedores v. Director**, **OWCP**, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final accident on August 1, 1995, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on December 20, 1999 (CX 9), concerning services rendered and costs incurred in representing Claimant between June 1, 1999 and December 9, 1999. Attorney David N. Neusner seeks a fee of $4,970.12 (including expenses) based on 17.00 hours of attorney time at $200.00 per hour and 3.25 hours of paralegal time at $55.00 per hour.

The Employer has objected to the requested attorney's fee as excessive in view of the benefits obtained and the services itemized. (RX 19)

In accordance with established practice, I will consider only those services rendered and costs incurred after April 14, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

The Employer objects to a certain charge as being duplicates and requests that the charge be deleted. I disagree. This matter has been successfully prosecuted with a most reasonable number of hours and the fee petition as filed is hereby approved.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $4,970.12 (including expenses of $1,365.12) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Commencing on December 29, 1998, and continuing thereafter for 104 weeks, the Employer as a self-insurer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $896.46, such compensation to be computed in accordance with Section 8(a) of the Act.

2. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his August 1, 1995 injury on and after December 29, 1998.

4. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the time

period specified in the first Order provision above, subject to the provisions of Section 7 of the Act.

6. The Employer shall pay to Claimant's attorney, David N. Neusner, the sum of $4,970.12 (including expenses) as a reasonable fee for representing Claimant herein after April 14, 1999 and between June 1, 1999 and December 9, 1999 before the Office of Administrative Law Judges.

DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:las